

THOMAS R. SMITH, ESQ.  
[smithtr@bsk.com](mailto:smithtr@bsk.com)  
P: 315.218.8325  
F: 315.218.8425

April 4, 2018

**VIA ELECTRONIC AND FIRST CLASS MAIL**

Sharon Kivowitz, Esq.  
Office of Regional Counsel  
U.S. EPA, Region 2  
290 Broadway, 17th Floor  
New York, New York 10007  
[Kivowitz.sharon@epa.gov](mailto:Kivowitz.sharon@epa.gov)

**FOR SETTLEMENT PURPOSES ONLY**

Re: *Administrative Order for Remedial Design*  
*Index No. CERCLA-02-2018-2015*  
*New Cassel/Hicksville Groundwater Contamination Superfund Site OU-1*  
*Statement of Position/Notice of Intent*

Dear Ms. Kivowitz:

This letter will constitute the statement of position of Respondent Barouh Eaton Allen Corporation ("BEA"), pursuant to paragraphs 46 and 47 of the Unilateral Administrative Order (the "Order"). This letter will also constitute BEA's notice of intent, pursuant to paragraphs 49 and 50 of the Order.

**Notice of Intent**

For the reasons set forth in more detail below, BEA must advise you that it cannot commit to compliance with the Order. BEA submits that its circumstances provide "sufficient cause" for its inability to comply and refusal to commit to compliance with the Order.

**Statement of Position**

On April 28, 2016, we wrote to you explaining BEA's reasons for its good faith belief that it is not responsible for the volatile organic compound contamination found in EPA's Operable Unit 1 ("OU-1"). We also explained in that letter that BEA is a company in liquidation with limited liquid assets available for responding to EPA's demands. A copy of the April 28, 2016 letter is attached as Exhibit A (the "April 28 Letter").

Nothing has changed since April 2016 to cause BEA to change its position as set forth in the April 28 Letter. Indeed, BEA's financial resources have diminished in the last two years, further limiting BEA's capacity to respond to EPA's demands. In fact, since the April 28 Letter, the shareholders have made loans to BEA in excess of \$3 million dollars to sustain the Company during its ongoing liquidation.

Sections 106(b) and 107(c)(3) of CERCLA provide that a party is not subject to treble damages or civil penalties if that party has "sufficient cause" not to comply with a unilateral administrative order ("UAO") issued pursuant to § 106. A party has "sufficient cause" if it has a reasonable belief that it is not liable under CERCLA, or can show that the applicable provisions of CERCLA or applicable guidance provide a basis for an objectively reasonable, good faith belief in the invalidity or inapplicability of the UAO to it. See *Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383, 390 (8th Cir. 1987). Moreover, as the statute (§ 106(a)) imposes penalties only for a party who "willfully violates or fails or refuses to comply with" a UAO. A party, such as BEA, that does not have the financial wherewithal to comply, does not act "willfully" if it is unable or fails to do so. The D.C. Circuit has construed the willfulness and sufficient cause limitations as analogous to the "good faith" and "reasonable grounds" defenses to statutes imposing fines required by the Supreme Court to satisfy due process. *General Electric v. Jackson*, 610 F.3d 110, 118 (D.C. Cir. 2010). In this respect, BEA has a good faith belief and reasonable grounds to assert that it is not responsible for the volatile organic compound contamination found in EPA's OU-1.

EPA's own guidance directs EPA to consider "the financial viability of PRPs" before issuing a UAO. OSWER Directive 9833.0-1a, "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions," March 7, 1990, p. 14. Likewise, before referring a case to the Department of Justice for enforcement of a § 106 order, EPA is admonished to consider "the financial viability" of a party. *Id.*, p. 28.

As described in the April 28 Letter, BEA commenced the process of liquidation and winding up of its business (which consisted primarily of sales of typewriter products which are now obsolete) in 2010. As such, the Company has had no revenue from operations. Its remaining assets consist primarily of the Swalm Street site, which is the subject of the EPA's administrative action, (which has been long vacant), and property the Company owns in Brooklyn (which has also been long vacant). These properties to date have been unmarketable, and have caused continued expense to the Company,

rather than being income-generating properties. In view of this financial reality, BEA cannot in good faith commit to compliance with the Order. Therefore, BEA contends that its financial condition provides sufficient cause and reasonable grounds for its non-compliance.

BEA also contends that it has sufficient cause for non-compliance with the Order because the statutory predicate for issuance of a UAO against BEA does not exist. A § 106 order is authorized only when “there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility ....” For the reasons stated in the April 28 Letter, the evidence does not demonstrate an imminent and substantial endangerment in EPA’s OU-1 *attributable to the BEA facility*. The analytical results summarized in the April 28 Letter showed that there were only relatively small amounts of PCE and TCE found at the site, which is located at the northernmost portion of the western New Cassel Industrial Area, geographically remote from OU-1. The September 23, 2013 Gradient Corporation report prepared for IMC Eastern Corporation (which can be provided by separate cover) concluded that the western plume PRPs, collectively, did not cause impacts requiring remediation south of Old Country Road; this conclusion is especially compelling in relation to BEA and the relatively small amounts of contamination found at its site.

BEA further contends that if any release of hazardous substances from the Swalm Street facility migrated to OU-1, the amount of such hazardous substances, and any impact attributable to them, would be *de minimis*, and would not justify any remedial actions. In fact, as mentioned in the April 28 Letter the NYS DEC Record of Decision in 2004 determined that BEA’s site did not pose a significant threat to human health and the environment, required no action, no remediation and only continued monitoring.

For the foregoing reasons, BEA also contends that it has a valid defense pursuant to CERCLA § 107(b)(3) in that the release of a hazardous substance or substances impacting OU-1 was caused solely by an act or omission of third parties, other than an employee or agent of BEA, or one whose act or omission occurred in connection with a contractual relationship with BEA. In other words, the evidence demonstrates that other PRPs, particularly those responsible for the Eastern Plume, including the Upgradient Parties, are the source of the contamination of concern.

For the foregoing reasons, BEA contends that its inability to comply, and its notice that it does not intend to comply, are made with sufficient cause and reasonable grounds, and

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therefore, it has no responsibility or liability under CERCLA § 106. BEA reserves all of its rights to assert additional defenses and grounds for sufficient cause, including but not limited to, the contention that the proposed remedy is arbitrary and capricious, or otherwise not in accordance with law.

Notwithstanding the foregoing, BEA remains willing to engage in good faith negotiations with EPA regarding a reasonable contribution to the costs of response related to OU-1.

Very truly yours,

BOND, SCHOENECK & KING, PLLC

A handwritten signature in black ink, appearing to read "Thomas R. Smith", written in a cursive style.

Thomas R. Smith

TRS/nlc  
Enclosures

cc: Mr. Robert Barouh  
William Ife, Esq.

# EXHIBIT A

THOMAS R. SMITH, ESQ.  
[smithtr@bsk.com](mailto:smithtr@bsk.com)  
P: 315.218.8325  
F: 315.218.8425

April 28, 2016

**VIA ELECTRONIC and FIRST CLASS MAIL**

Sharon E. Kivowitz, Esq.  
Office of Regional Counsel  
U. S. Environmental Protection Agency  
Region 2  
290 Broadway, 17<sup>th</sup> Floor  
New York, New York 10007

**CONFIDENTIAL  
FOR SETTLEMENT PURPOSES ONLY  
NOT TO BE USED OR ADMITTED FOR ANY OTHER PURPOSE**

Re: *New Cassel/Hicksville Groundwater Site*  
*Barouh Eaton Allen Corporation*

Dear Ms. Kivowitz:

We write on behalf of Barouh Eaton Allen Corporation ("BEA") in regard to the Environmental Protection Agency's (the "EPA") investigation of the New Cassel Industrial Area (the "NCIA").

At this time we respectfully request that the EPA consider a lump sum cash-out settlement with BEA with respect to its potential liability for remedial action at the New Cassel/Hicksville Groundwater Site. In making this request, we ask that you consider the following: (1) the technical data demonstrating that BEA's facility at 118-130 Swalm Street, North Hempstead, ("Swalm Street") in the NCIA did not contribute to the volatile organic compound contamination which is the subject of concern in EPA's Operable Unit 1 ("OU-1"), and (2) BEA's status as a company in liquidation with a very limited ability and timeframe to pay the costs of the anticipated remedial action.

**Background of BEA's Swalm Street Site**

BEA acquired the Swalm Street property in November 1979, and has owned it continuously since then. BEA itself has never conducted operations at the Swalm Street property. At the time that BEA acquired the property, a company known as Louis Jordan Labs ("LJL"), a manufacturer of vitamin capsules, cough syrup and cream formulations was conducting manufacturing operations at the site. LJL leased the property from BEA's predecessor beginning in 1977 and operated there through 1980.

Also beginning in 1977, a company known as Varitek, a company related to BEA, used a portion of the property for assembly of machines and equipment to be sold to BEA for use in its operations in Brooklyn. Varitek ceased operations at Swalm Street in 1992. From 1994 through 2005, the property was leased to a company named Liqui-Mark that manufactured magic markers, highlighters, pens and other writing instruments. The property has been vacant since 2005.

BEA has no knowledge of the use of PCE or TCE at the property. BEA is aware of anecdotal information that LJI may have used TCA as a dip to remove mineral oil from soft gelatin capsules, but cannot confirm that information. It has no knowledge of any other use of TCA at the property.

As noted, BEA itself has never conducted operations at the Swalm Street property. At BEA's Brooklyn, New York property, it manufactured typewriter and printer ribbons. With the advent of computers BEA's typewriter products became obsolete. BEA's declining sales caused the Corporation to end all sales activity and cease manufacturing operations by the beginning of 2010. Since then BEA has been in the process of liquidation.

### Investigation Results

The Swalm Street property is the northernmost property of the NCIA sites identified by the EPA as potential sources of groundwater contamination in OU-1, and is one of the sites located in the western part of the NCIA alleged to be responsible for the "Western Plume."

Potential contamination at the Swalm Street property was investigated by Fanning, Phillips & Molnar ("FPM") in a focused remedial investigation ("FRI") in 1999, followed by a supplemental focused remedial investigation ("SFRI") in 2000. FPM's successor, Envirosience Consultants, Inc., completed an off-site groundwater investigation related to the site in 2002. The results of these investigations showed minimal soil and groundwater contamination at and in the vicinity of the Swalm Street property.

The FRI reported that TCE and PCE were detected in former leaching pool sediments at concentrations far below the TAGM 4046 Soil Cleanup Objectives (less than 50% of the SCOs). Shallow soil samples showed PCE at 14 ug/kg and 82 ug/kg, and 1, 1, 2-TCA at 14 ug/kg – orders of magnitude below the applicable SCOs; no PCE, TCE or TCA was detected in Geoprobe samples at depths of from 18 to 40 ft bgs. In groundwater, there were reported exceedances of standards for PCE, but at concentrations of only 560 ug/L, 8 ug/L and 7 ug/L. The report also concluded that there was a possible upgradient source, based on detections of PCE in an upgradient well sampled in prior investigations.

The 2000 SFRI report described sediment samples from the former leaching pools with concentrations of 5 and 15 ppb of TCE and 9 ppb of PCE; PCE concentrations in groundwater samples ranged from 5.9 to 42 ppb. The report concluded that there was no continuous source of PCE at the site, and that an upgradient source existed.

In 2002, Envirosience conducted off-site sampling of groundwater between 200 and 900 feet downgradient, finding a maximum PCE concentration of 110 ppb. Notably, this limited off-site contamination was not clearly linked to a source at 118-130 Swalm Street. The report concluded that "a significant plume is no longer present in the aquifer in the area at or downgradient of the site."

In March 2004, the NYSDEC issued a Record of Decision for the Swalm Street site. The selected remedy was "No Action with continued groundwater and soil vapor monitoring," based on the lack of significant soil contamination and a finding that the site did not pose a significant threat to human health and the environment. From 2008 to 2011, MACTEC Engineering and Consulting, P.C. undertook follow-up groundwater sampling for the NYSDEC. In multiple rounds of sampling, PCE was detected at a maximum concentration of 14 ug/L (most recent 7.2 ug/L); the maximum concentration of TCE detected was 4.7 ug/L (in most recent sampling events it was reported as ND).

Therefore, Swalm Street, situated in the northernmost part of the Western Plume and located farthest from OU-1, has exhibited only de minimis concentrations of the contaminants of concern, and there is no evidence of a sustained plume emanating from the site and migrating south toward OU-1. As you may recall, the September 23, 2013 report prepared by Gradient Corporation for IMC Eastern Corporation ("Comments on the Proposed Plan for Operable Unit 1 of the New Cassel/Hicksville Groundwater Contamination Superfund Site") concluded that "the NCIA Western Plume has always been limited in spatial extent and attenuates to concentrations below the SCGs before reaching Old Country Road." As Swalm Street is in the Western Plume farthest north from Old Country Road, with only minimal concentrations of PCE and TCE at the site, no continuing source, and no documented "plume" emanating from the site, the only reasonable conclusion is that it has had no impact on OU-1, and BEA is not properly included as a PRP for OU-1.

#### BEA's Liquidation and Financial Circumstances

As noted above, shortly after the death of its founder, Victor Barouh, in October of 2008 and in view of declining sales of its typewriter products and resulting corporate losses, BEA commenced the process of liquidation and the windup of its business. Since 2010, there has been little revenue generated by the Corporation, which is insufficient to cover its expenses and carrying charges on its existing properties in Brooklyn and in Swalm Street. BEA is down to only 4 employees on its austerly



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budget. We have attached BEA's recent bank statements showing its available cash. BEA's accountant is preparing the financial statements and the responses to the EPA's financial questionnaire to detail BEA's current financial status and its restricted cash flow, which will be sent to you shortly under separate cover. Therefore, BEA requests that the EPA accept a cash out settlement rather than require BEA to expend more money from its dwindling reserves to continue the protracted investigation and remediation process, or waste resources in potential litigation. In conclusion, we respectfully request a proposed settlement in consideration of BEA's financial status and the environmental data on BEA supporting its de minimis impact to the contamination at OU-1. We remain available to discuss this with you at your convenience.

Very truly yours,

BOND, SCHOENECK & KING, PLLC

A handwritten signature in black ink, appearing to read "Thomas R. Smith", written in a cursive style.

Thomas R. Smith

TRS/khn  
Enclosures

cc: Robert Barouh (via Electronic Mail)  
William B. Ife, Esq. (via Electronic Mail)



Primary Account: 840-02015

# YOUR MERRILL LYNCH REPORT

BAROUH EATON ALLEN CORP  
C/O RICHARD BAROUH  
10800 NW 5TH ST  
PLANTATION FL 33324-1532

March 01, 2016 - March 31, 2016

## PORTFOLIO SUMMARY

	March 31	February 29	Month Change
<b>Net Portfolio Value</b>	<b>\$ 641,870.81</b>	<b>\$ 1,332,376.24</b>	<b>\$ 690,505.43</b> ▼
Your assets	\$ 641,870.81	\$ 1,332,376.24	\$ 690,505.43
Your liabilities			
Your Net Cash Flow (Inflows/Outflows)			
Securities You Transferred In/Out			
<b>Subtotal Net Contributions</b>	<b>(\$ 690,000.00)</b>	<b>(\$ 500,000.00)</b>	
Your Dividends/Interest Income	\$ 0.68	\$ 85.72	
Your Market Gains/(Losses)	(\$ 506.11)	\$ 2,079.09	
<b>Subtotal Investment Earnings</b>	<b>(\$ 505.43)</b>	<b>\$ 2,164.81</b>	

If you have questions on your statement, call 24-Hour Assistance: (866) 4MLBUSINESS (866) 465-2874

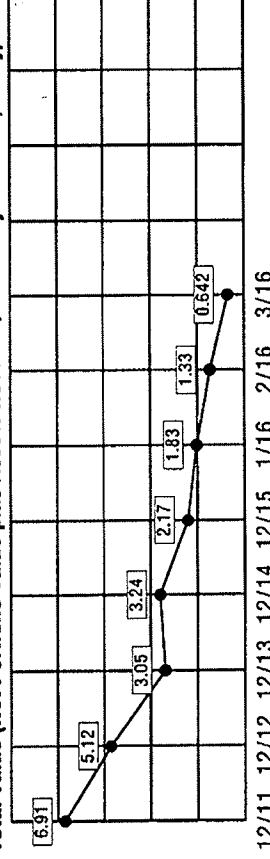
Investment Advice and Guidance: Call Your Financial Advisor

**Your Financial Advisor:**  
LEVINE, FERRARA, LORENZO GROUP  
1325 FRANKLIN AVENUE 4TH FL  
GARDEN CITY NY 11530  
1-800-937-0785

Up-to-date account information can be viewed at: [www.mymerrill.com](http://www.mymerrill.com), where your statements are archived for three or more years.

Questions about MyMerrill? Click the "help" tab at the top of the screen once you log in.

Total Value (Net Portfolio Value plus Assets Not Held/Valued By MLPF&S, if any) in millions, 2011-2016



## YOU MAY STILL BE ABLE TO MAKE A 2015 IRA CONTRIBUTION UNTIL

4/18/2016. If you earned income in 2015 and have not yet made an IRA contribution for 2015, you have until April 18, 2016 to complete your contribution. Call your financial advisor today for details.

Merrill Lynch Wealth Management makes available products and services offered by Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPF&S) and other subsidiaries of Bank of America Corporation. MLPF&S is a registered broker-dealer, Member Securities Investor Protection Corporation (SIPC) and a wholly owned subsidiary of Bank of America Corporation. Investment products: **Are Not FDIC Insured** **Are Not Bank Guaranteed** **May Lose Value**

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JPMorgan Chase Bank, N.A.  
P O Box 659754  
San Antonio, TX 78265 - 9754

March 01, 2016 through March 31, 2016  
Account Number: 000000012075981

#### CUSTOMER SERVICE INFORMATION

Web site: [www.Chase.com](http://www.Chase.com)  
Service Center: 1-877-425-8100  
Deaf and Hard of Hearing: 1-800-242-7383  
Para Espanol: 1-888-622-4273  
International Calls: 1-713-262-1679

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BAROUH EATON ALLEN CORP D/B/A KORECTYPE  
CORPORATION  
67 KENT AVE  
BROOKLYN NY 11249-1926

#### WE ARE CHANGING THE FEE ON OUTGOING WIRE TRANSFERS NOT REQUESTED ONLINE

Your relationship is important to us, and we are committed to keeping you informed about changes that may affect you.

Starting March 22, 2016:

For outgoing wire transfers NOT requested online (for example, in a branch) the fee will increase to:

- Domestic Wire Fee: \$35 per transfer
- International Wire Fee: \$50 per transfer

The fee for outgoing wires made via Chase Online(SM) and Chase Mobile(R) (only available for domestic wires) remains the same. Transfer limits apply. Savings accounts cannot be used to fund wire transfers initiated on Chase Online(SM) and Chase Mobile(R). Incoming wire transfer fees remain the same.

These fees are waived for the following products:

- Chase Client Funds Checking(SM)
- Trust accounts for lawyers and realtors (names vary by market)

All other terms and conditions of your Deposit Account Agreement still apply. If you have any questions, please call the number listed at the top of this statement.

#### We are changing our Overdraft Protection service in August 2016

We will simplify Overdraft Protection, a service that allows enrolled customers to avoid overdrawing a checking account by transferring money from a linked account.

##### Starting August 20:

- Only a Chase business savings account or business line of credit will be able to provide Overdraft Protection to a business checking account. A credit card cannot be used.
- We will transfer the exact amount needed to cover the transaction instead of multiples of \$50.
- We will no longer charge the \$10 Overdraft Protection Transfer fee.

As a reminder, a \$5 Savings Withdrawal Limit Fee may apply for each withdrawal or transfer over six per monthly statement period from your savings account, including withdrawals at a branch or at an ATM. For Chase Business Select High Yield Savings<sup>SM</sup> this fee is waived if there is a balance of \$15,000 or more in the account at the time of the withdrawal or transfer.

If you have a credit card linked for Overdraft Protection, you have two options:

1. Link to a business savings account or business line of credit instead. Visit [chase.com](http://chase.com) or talk to a banker to learn more. OR,
2. Keep your current settings, knowing that this could cause declined transactions and you may pay more fees when we remove the link to your credit card.



March 01, 2016 through March 31, 2016  
Account Number: 000000012075981

- Starting August 17, unless you have instructed us not to approve debit card purchases that overdraw your business account, you may have to pay a **\$34 Insufficient Funds Fee** each time we approve an everyday debit card transaction if your checking account can't cover your purchase. Through August 19, we will continue to transfer funds for transactions that would overdraw your account.
- Keep in mind our **Standard Overdraft Practice** will apply if your checking account does not have enough money available to cover a transaction. In that case, we may charge you a \$34 Insufficient Funds Fee or \$34 Returned Item Fee for each check, recurring payment or other transfer that is for more than the amount available in your account. Refer to your Deposit Account Agreement at chase.com for details on how your transactions work.

We waive one Insufficient Funds Fee or Returned Item Fee per monthly statement cycle for Chase Platinum Business Checking<sup>SM</sup> accounts.

If you have questions, please visit chase.com or call the number listed at the top of your statement.

## CHECKING SUMMARY

### Chase Platinum Business Checking

	INSTANCES	AMOUNT
Beginning Balance		\$196,865.28
Deposits and Additions	4	93,030.00
Checks Paid	12	- 8,659.04
Electronic Withdrawals	62	- 78,602.07
Ending Balance	78	\$202,634.17

Your Chase Platinum Business Checking account provides:

- No transaction fees for unlimited electronic deposits (including ACH, ATM, wire, Chase Quick Deposit)
- 500 debits and non-electronic deposits (those made via check or cash in branches) per statement cycle
- \$25,000 in cash deposits per statement cycle
- Unlimited return deposited items with no fee

There are additional fee waivers and benefits associated with your account – please refer to your Deposit Account Agreement for more information.

## DEPOSITS AND ADDITIONS

DATE	DESCRIPTION	AMOUNT
03/01	Deposit 1482265713	\$1,000.00
03/07	Deposit 1482265716	1,030.00
03/22	Deposit 1482265717	1,000.00
03/24	Merrill Lynch Funds Trfr 84002015 032316 PPD ID: 1066026814	90,000.00
Total Deposits and Additions		\$93,030.00

## CHECKS PAID

CHECK NO.	DESCRIPTION	DATE PAID	AMOUNT
7416 ^		03/04	\$1,375.00
7417 ^	03/11	03/11	375.00
7418 ^		03/07	32.62
7419 ^	03/11	03/11	250.00
7420 ^		03/15	4,427.50
7421 ^		03/15	225.59